IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

DAVID NEILL MAC MURRAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 18792

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of three years. [R. 9]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the

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* R refers to the typed Transcript of Record.

prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R. 10]

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 562 (Universal Military Training and Service Act) for refusing to submit to induction. [R. 2]

Appellant pleaded Not Guilty, waived jury trial and was tried on April 8, 1963. [R. 9] He was convicted by Judge William C. Mathes on April 22, 1963, and sentenced by him on said date. [R. 9] On said latter date appellant filed his Notice of Appeal. [R. 10]

Before Plea a Motion to Dismiss Indictment was filed, argued and denied. [R. 4] At the close of the evidence, a Motion for Judgment of Acquittal was made, argued and denied. [R. 6].

THE FACTS

Appellant registered with Local Board No. 84 on February 1, 1957. [Ex. 2]** He filed his 8-page Classification Questionnaire on July 3, 1958 [Ex. 6-14] and indicated in it that he was a conscientious objector to war. [Ex. 8]

** Ex. refers to the Government's exhibit, the selective service file of appellant.

The pagination is at the bottom of each sheet of the exhibit, circled.

On June 26, 1958 he fully executed and timely filed the Special Form for Conscientious Objector when it was sent him by the Board. On its front page he signed the declaration that indicated his conscientious objection to participation in military activity was total and he crossed out the portion that would constitute a claim for a non-combatant classification. [Ex. 16] When confronted with question one: "Do you believe in a Supreme Being?" he marked the box for NO. [Ex. 16] In response to question four which asked appellant to give the name and present address of the individual upon whom he relies most for religious guidance, he stated "I rely on myself for my religious guidance." [Ex. 17] In response to question six which asked appellant to describe the actions and behavior in his life which in his opinion most conspicuously demonstrate the consistency and depth of his religious convictions, appellant stated "I have a great regard for the value of human life, as well as a love of all peoples and races. I am a very creative person being a poet, musician, and writer. I am a very sensitive person completely intolerant of violence and destructive measures." [Ex. 17] The Special Form also asked Are you a member of a religious sect or organization? He answered "NO". [Ex. 18]

Appellant was classified by his Local Board in Class I-A on February 10, 1960 [Ex. 13], and, when he did not appear for a scheduled Appearance Before Local Board his file was sent to the Appeal Board which kept him in the same classification. [Ex. 13] The United States Attorney and the Attorney General agreed, in the words of the latter, that: "By denying belief in a Supreme Being and assert-

ing that his belief is based upon 'the makeup of his personality and mind', the registrant has removed himself from consideration as a conscientious objector within the meaning of Section 6 (j). See *U. S.* v. *Bendik*, 220 F.2d 249 (2d Cir. 1955), *U. S.* v. *DeLime*, 223 F.2d 96 (3d Cir. 1955), *Davidson* v. *U. S.*, 218 F.2d 609 (9th Cir. 1954); Cert. granted 349 U.S. 918 (1955); Court of Appeals judgment vacated and cause remanded; conviction affirmed 225 F.2d 836 (9th Cir. 1955); cert. denied 350 U.S. 887 (1955), *Clark* v. *U. S.*, 236 F.2d 13 (9th Cir. 1956)." [Ex. 43]

On July 24, 1963 he wrote the Board that he desired to expand and clarify his evidence (Ex. 72-75); he did this but the Board refused to reopen his classification and on November 26th he refused to submit to induction. [Ex. 86]

QUESTIONS PRESENTED AND HOW RAISED

I

The evidence shows appellant did not receive the FBI investigation, the Department of Justice hearing, or its report and recommendation on his appeal to the Appeal Board and that the reason was the United States Attorney's refusal to accord him these appellate steps because appellant did not believe in a Supreme Being. [Ex. 41]

The question presented is whether appellant was illegally deprived of the named appellate steps, as raised in Motion for Judgment of Acquittal. [R. 6]

II

The record shows that appellant was not considered eligible for a conscientious objector classification because

he did not believe in a Supreme Being, as required by the Act.

The question presented is whether the Act discriminates against religions and religious persons who do not express themselves in such orthodox terms, as raised by the Motion. [R. 8]

SPECIFICATION OF ERRORS

I

The district court erred in failing to grant the motions for judgment of acquittal.

II

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

I

The Act and the Regulations mandatorily provide that, upon administrative appeals involving claims of conscientious objectors, certain procedures be followed.

The decision of the United States Attorney to deprive appellant of the FBI investigation, the Hearing Officer hearing, and the recommendations to the Attorney General and the Appeal Board was illegal.

II

Congress has required that a registrant, professing to be a conscientious objector to war show certain qualifica-

tions to be entitled to a conscientious objector classification: he must believe in a Supreme Being and his beliefs must be "religious" and not be a "merely personal moral code."

The Supreme Being requirement offends the Constitution:

> The VIth Article (3rd clause) provides that no religious test shall ever be used as a qualification for any political office. The Supreme Being clause, nevertheless, makes it impossible for many truly religious citizens to qualify for a conscientious objector classification; inevitably, their religious scruples make felons out of them, as the law now stands, and they are thereafter disqualified for public office.
>
> The First Amendment provides that Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof.
>
> The Supreme Being clause is an establishment of the religious views of the majority:
>
> Congress has no right to legislate what is and what is not religious belief.
>
> Finally, a registrant may have religious beliefs, meeting all reasonable standards, even though he does not believe in a Supreme Being.

ARGUMENT

I.

Appellant Was Illegally Deprived of His Right to an Investigation, Hearing, Report and Recommendation, upon His Administrative Appeal.

We argue that the draft board lost jurisdiction to order appellant to report for induction because he was denied procedural due process of law in that the Department of Justice illegally deprived him of his right to an investigation, hearing, report and recommendation upon his claim for classification as a conscientious objector, contrary to Section 1626.25 of the Selective Service Regulations and Section 6(j) of the Act.

A. Act and Regulations involved.

Section 6(j) of the act reads in part:

> "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the president, or (2) if the objector is found to be conscien-

> tiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

The regulations [32 C.F.R.] provide:

1626.25 Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the

appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written

reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The Appeal Board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

The denial of a hearing provided for by the regulations is a denial of due process: *United States* v. *Peterson,* 53 F. Supp. 760 (N.D. Calif. S.D.); *United States* v. *Laier,* 52 F. Supp. 392 (N.D. Calif. S.D.); *United States* v. *Fry,* 203 F.2d 638 (2nd Cir.); *Davis* v. *United States,* 199 F.2d 689 (6th Cir.); Compare *Knox* v. *United States,* 200 F.2d 398 (9th Cir.); see also *United States* v. *Frank,* 114 F. Supp. 949 and *Sterrett* v. *United States,* 9 Cir., 1954, 216 F.2d 659.

The hearing and ancillary benefits of the Act and regulation above quoted were denied appellant solely because of the blocking action of the United States Attorney [Ex. 43]. The problem, therefore, is whether the action of the United States Attorney was erroneous and contrary to the Act and the regulation. If all registrants claiming a conscientious objector classification are entitled. when timely

perfecting an administrative appeal, to have the special appellate procedures prescribed by Congress, then appellant was denied procedural due process.

Section 1622.14 of the Selective Service Regulations (32 C.F.R. § 1622.14) provides:

> "Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces.
>
> "(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:
>
> " 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' "

Section 1623.2 of the regulations (32 C.F.R. § 1632.2) provides:

> "Consideration of Classes.—Every registrant shall be placed in Class I-A under the provisions of Section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered

the highest class and Class I-C considered the lowest class, according to the following table:

Class:	I-A-O	Class:	IV-A
	I-O		IV-B
	I-S		IV-C
	II-A		IV-D
	II-C		IV-F
	II-S		V-A
	I-D		I-W
	III-A		I-C"

Appellant was denied the conscientious objector status by the appeal board on August 18, 1960 [Ex. 13] and the Department of Justice returned the file to it *without* an investigation and hearing; the appeal board again denied Mac Murray the conscientious objector status on March 23, 1961 [Ex. 13]. This action of the Department conflicted with the express provisions of the Selective Service Regulations then in existence. These regulations made it mandatory that the appeal involving conscientious objections be referred to the Department of Justice *for inquiry and hearing.*

The appeal board made a preliminary determination that the conscientious objector claim be denied. The entry of this determination in the minutes made it mandatory according to Section 1626.25 of the regulations that the Department of Justice procedure be followed. The United States Attorney illegally defied Section 6(j) of the act and the regulations, Section 1626.25.

The Act and the regulations made the Department of Justice procedure mandatory. The return of the file to the

appeal board without investigation prejudiced the appellant. It denied him the full and fair hearing required by the regulations. See *Sterrett, supra.*

An inspection of the act and regulations shows this was a positive and injurious denial of the conscientious objector procedure guaranteed by the act and Section 1626.25 (b) of the regulations.

"Shall" is used in the sentence of the act commanding the inquiry and hearing. This is followed by the word "refer". Following the word "refer" are the words "any such claim." "Any such claim" means any conscientious objector claim. This would mean that if an appeal had any conscientious objector claim in it, it would be the duty of the appeal board to refer it to the Department of Justice.

B. Legislative History.

It is helpful in understanding the conscientious objector provisions of the Act to consider the background of the prior Acts. The 1951 and 1948 Acts being identical to the 1940 Act in most respects, it is necessary to consider the history of the 1940 Act along with the history of the 1948 Act. Senate Report No. 1268, 80th Congress, Second Session, dated May 12, 1948, accompanying Senate Bill 2655, indeed, under Section VI, discussing Section 6(j) of the act, said concerning conscientious objection: "This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 Act."

The report on the 1948 Act says that it is exactly like the 1940 Act. This means that the same statutory con-

struction that prevailed under the 1940 Act should be followed for the 1948 Act.

In 1940, the "Statement of the managers on the part of the House" in making their conference report on September 12, 1940, shows there was an original plan to refer the conscientious objector cases by the local board to the Department of Justice. The House amendment was accepted by the joint conference and an agreement reached that the conscientious objector classification would be first determined by the local board with the right of appeal. Among other things, the conference report reads:

> "* * * Upon the filing of such appeal, the appeal board is directed forthwith to refer the matter to the Department of Justice for an inquiry and hearing. After appropriate inquiry by the proper agency of the Department of Justice, a hearing is to be held by the department with respect to the character and good faith of the objections."—86 Cong. Rec. 12038, 76th Congress, Third Session.

The report made to the House was also made to the Senate on the next day.—See Hearings on Senate Bill 4164, 86 Cong. Rec. 12082, 76th Congress, Third Session.

The House Report No. 2947 to accompany Senate Bill 4164 dated September 14, 1940, states under "Conscientious Objectors":

> "After appropriate inquiry by the appropriate agency of the Department of Justice, a hearing was held by the Department of Justice in the case of each such person with respect to the character and good faith of his objections."—See pages 17-18, House Re-

port No. 2947, 76th Congress, Third Session, September 14, 1940.

The Senate Report No. 2002, on Senate Bill 4164, dated August 5, 1940, reads as follows:

> "The measure is *fair* both to a person holding conscientious scruples against war and to the Nation of which he is a part. It provides for inquiry and hearing by the Department of Justice to make recommendations as to whether a person claiming deferment because of conscientious objection to war is or is not a bona fide conscientious objector. * * * The rights of a concientious objector and of the government are fully protected against possible local prejudice, influence, or passion, by provision for appeal to a board of appeal." (Emphasis added.)—See Senate Report No. 2002, 76th Congress, Third Session, p. 9.

C. Administrative Construction.

Historically, it was always the view of the Department of Justice and the Selective Service System that the Selective Training and Service Act of 1940, required a reference to the Department of Justice for investigation and hearing in every case where the appeal board did not sustain the conscientious objector classification.

National Director of Selective Service, General Lewis B. Hershey, in the publication entitled "Conscientious Objection" said:

> "The Department of Justice and Selective Service took the position that each time the case of a registrant who claimed to be a conscientious objector came before a board of appeal, the case must be referred to the Department of Justice for its recommendation.

> This was felt to be the direct application of the law. In addition such reference was necessary because *new factors* in the case might be brought to light by the Department's investigation and hearing. * * *" (Emphasis added)—See Selective Service System, Conscientious Objection, Special Monograph No. 11, Vol. I, pp. 147, 150, 155, Washington, Government Printing Office, 1950.

Subsequently, in 1952, the Department of Justice changed its construction of the statute and sought an amendment to the regulations, dispensing with the reference to the Department of Justice *where the local board gives the I-O classification,* (see *Sterrett, supra*) obviously for the purpose of lightening the burden of the Department of Justice. On July 3, 1952, it secured such a change, but subsequently (doubtless because of the *Sterrett* decision on October 25, 1954, and the *Gonzales* decision on March 14, 1955, 75 S. Ct. 409) had the regulation changed back. At present, as before July 3, 1952, the Appeal Board has two chances at the conscientious objector-appellant's classification, all as set forth in the regulations reproduced at the beginning of this argument. To round out the history of change, although it doesn't concern our main problem, it should be noted, in passing that in 1956, the then current version of § 1626.25 required that the appeal board send the file to the Department for the special appellate procedures as soon as it appeared the appeal involved a conscientious objector claim, but that in 1957, this regulation was changed back to the original, 1948 version, and that this has been the procedure ever since.

It is clear the department still wants to get out of investigating as many of these cases as possible. It thinks it sees a loophole by reading into the statute something that is not there. Although some courts have condoned this we contend the Government ought to produce something from Congress authorizing this change. The Department of Justice cannot do so. Its failure proves that it is trying to amend the statute and make it different from what Congress intended. The fact that the executive order, at the time of Sterrett's case incorporated the departmental interpretation of the act into the regulations did not make it valid. That amended regulation, by executive order, flew into the teeth of the act of Congress and this court so held. See *Sterrett,* 664-665.

We urge that the position currently taken by the Department of Justice is unreasonable just as the changed regulation resulting from the executive order of the President, at the time of Sterrett was held unreasonable by this court [664-665]. The over-all purpose of Congress in dealing with the conscientious objectors must be considered.

It is beyond dispute that Congress intended to exempt all conscientious objectors found by final determination to be such. The congressional report on the 1940 Act shows an intent to have the Department of Justice investigate every case where there is any question about the conscientious objector status. The intent to have the investigation is not hinged on the type of appeal that was taken. Congress knew that when an appeal was taken there would be a completely *de novo* consideration of the conscientious objector problem.

It is apparent Congress knew that the local boards would not have the final say in all cases. It knew that appeals would be taken. In fact the act provides for appeals generally.

The Act of Congress, Section 10(b), provides for the boards. Section 10(b)(3) in particular mentions the local boards and appeal boards. Section 6(j) deals specifically with conscientious objectors, including procedure on appeal. The sentence in that section of the act, reading "Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board," is mere surplusage. The registrant would have the right to take an appeal in any event under the act. It merely recognizes that he has the right to take an appeal like all other registrants. The conscientious objector is not limited in taking an appeal claiming other grounds. This provision of the act was merely to ensure that the conscientious objector had the right to appeal from the denial of the claim.

We contend that the controlling sentence is the one following the one above quoted, namely, "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing." The words "such appeal", cannot be reasonably interpreted to mean "only in event he appeals from a denial of the conscientious objector claim." The sentence says that upon the filing of the appeal the appeal board shall refer any such claim to the Department of Justice. If Congress intended to limit "such claim" it would have said so. The

proper interpretation of this sentence is that whenever any appeal taken to the appeal board involves the conscientious objector claim, "such claim" must be referred to the Department of Justice for inquiry and hearing unless the appeal board grants the complete conscientious objector classification immediately upon taking the appeal.

The taking of the appeal from any local board classification for all practical purposes constituted an obliteration of that classification regardless of what the classification may have been. This would put the registrant in the same position before the appeal board as before the local board before any classification. Now with the registrant standing in this unclothed position before the appeal board and with the appeal board having doubt or intending to deny the conscientious objector classification, it would be plain that Congress intended that there would be an investigation and hearing by the Department of Justice.

We argue that the only way that this conclusion can be escaped is to have something specific in the act which would command that there be no investigation in such circumstance.

The reasonableness of this interpretation and the unreasonableness of the construction placed upon the act by the Government, is manifest, we believe. Otherwise, it would put Congress in an incongruous positon. It would mean that the appeal board and the Department of Justice would have greater authority than the local board, thus making the law inconsistent. The appeal board and the Department have no greater authority than the local board so far as classification is concerned. Congress was

after the facts on claims involving conscientious objectors. Congress did not empower the Department to determine the facts *without* the special appellate procedures. The only way the facts could be obtained was to refer the matter to the Department of Justice *for* the special appellate procedures. The very purpose of the Department of Justice investigation was to protect the Government against malingerers *and* to insure the *bona fide* conscientious objector against arbitrary and capricious denials. If the local boards were not permitted by Congress to exercise arbitrary and capricious power, then certainly neither the Department nor the boards of appeal were intended by Congress to have such power.

It should be remembered that the investigation and hearing in the Department of Justice is not only for the benefit of the Government. It also is for the benefit of the registrant. The appeal board is entitled to know all the facts about "any such claim." A registrant is entitled to have the claim developed in the Department of Justice if it is not to be granted by the draft boards—either local or appeal.

It is unreasonable to say that Congress intended to make the safety and welfare of the conscientious objector before the appeal board dependent on whether the Department looked with favor on the claim. Since the appeal board has no greater authority than the local board, the logical consequence is that the hearing in the Department of Justice must be had.

It is desirable to look further into the history of the various bills that were proposed to Congress. The original

(1940) Burke-Wadsworth Bill had in mind that every conscientious objector claim be investigated by the Department of Justice as soon as the claim was made to the local board. That procedure, if made the law, would have required every claim filed with the local board to be investigated by the FBI. This 1940 bill was objected to in Congress and finally a compromise was reached whereby the reference to the Department of Justice was provided for when the conscientious objector claim reached the appeal board. If Congress intended that originally all such claims be investigated by the Department of Justice before the local board passed on the claim then the change of the original bill to require the appropriate inquiry and hearing in the Department of Justice after an appeal to the appeal board would indicate that Congress had in mind the same type of investigation being made in every case after the claim reached the appeal board.

In any event Congress intended in the original bill that every conscientious objector claim that was questioned by the local board should be investigated by the Department of Justice. If this was the intention of Congress then when this investigation was transferred from the local board to the appeal board in the final conference report of the two joint committees of Congress in 1940, it would also indicate that Congress intended that there should be an investigation where the appeal board or anyone questioned the claim. In other words, if Congress intended an investigation if the local board denied the claim, by force of the same reasoning the subsequent bill transferring the investigation to the appeal board would mean that the appeal board's tentative denial would require the investigation too.

The sentence of the act immediately preceding the sentence providing for the inquiry and hearing is merely declaratory of the rights of the registrant to an appeal. It merely iterates for the conscientious objector the right of appeal that is granted all registrants under the act. If the sentence is interpreted in this way, the sentence that follows about inquiry and hearing means that there should be an investigation and hearing following the filing of such appeal. "Such appeal" means an appeal by a conscientious objector or by a person having "such claim" as a conscientious objector. The word "appeal" used in the sentence is not in any way qualified. Since the right to the investigation flows from the taking of the appeal, it is absolutely mandatory that the inquiry and hearing be conducted by the Department of Justice in every case where there is an appeal to the appeal board and where a claim for classification as a conscientious objector is involved in such appeal, regardless of the appeal board classification.

When appellant was deprived of the special appellate procedures the Selective Service System lost jurisdiction over him. There is a great difference between the scope of review for the purpose of upsetting a determination by a draft boad and the scope of review of the determination of some other administrative agencies. The scope of review permitted in draft cases is limited to that allowed in deportation cases. (See the cases cited in footnote 14 of the Estep case, 327 U.S. 114, 123, 66 S. Ct. 423 (1946).) Notwithstanding this limitation placed on the judicial review of an administrative determination, the fact remains that procedural due process of law must be strictly adhered

to. The rule is stated in *N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 1938, 98 F.2d 444, 446, that where the scope of review is very narrow and restricted, then the need is greater for an insistence on strict compliance with the procedural provisions. This is true even in draft cases. (See *Ver Mehren* v. *Sirmyer*, 8th Cir., 1929, 36 F.2d 876, 881 and *United States* v. *Zieber,* 3rd Cir., 1947, 161 F.2d 90, 92.) These cases hold that there must be a full and strict compliance with the procedural provisions. There are many other cases involving procedural violations that support this rule.

It is submitted that the failure to conduct an investigation, make a report after an oral hearing and send a recommendation to the appeal board by the Department of Justice deprived appellant of his procedural rights contrary to Section 6(j) of the act and Section 1626.25 of the regulations.

II.

The Act Discriminates Against Religions and Religious Persons Who Do Not Express Themselves in Orthodox Terms and Is Constitutionally Offensive.

The draft laws since 1948 contain an innovation. The so-called "Supreme Being" clause is not found in the 1940 or 1917 draft laws.

A. The Statute Involved.

Section 6(j) of the Selective Service Act of 1948, as amended (62 Stat. 604, 50 U.S.C., App. 98), also known now as the Universal Military Training and Service Act,

as amended in 1951, 65 Stat. 75, 50 U.S.C.A., Appendix is the section. The part pertinent to our point is:

> "Nothing contained in this title [this appendix] shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical view or a merely personal moral code."

B. Mac Murray's Sincerity Not Questioned.

Appellant Mac Murray considers himself a conscientious objector to war. The record is clear [Ex. 8, 16-19, etc.] Additionally, there is nothing in the record reflecting adversely on his sincerity or truthfulness. Nor is there anything to show that his conduct does not conform to his subjective views. See *Witmer* v. *United States,* 75 S. Ct. 392 (1955) at 395. While it is correct to test a registrant's sincerity by his conduct, other elements, such as sweetness of personality, etc., are immaterial. See *Annett* v. *United States,* 10 Cir., 1953, 205 F.2d 689, 692, where the court frowned on the use of immaterial elements in classification decisions [Annett had been found to lack humility].

Before the present act (and its 1948 predecessor) the draft laws required only "religious training and belief." The construction given this phrase by some courts, notably the Second Circuit is considered the reason Congress added the so-called Supreme Being clause, in 1948. Specifically,

Philips v. *Downer,* 1943, 135 F.2d 521 and *U.S.* v. *Kauten,* 1943, 133 F.2d 703. In this latter case the Hearing Officer had found:

> "The registrant makes it quite clear that his religious training and belief is not the basis of his present opposition to war.
>
> "There is no doubt that the registrant is sincerely opposed to war but this belief emanates from personal philosophical conceptions arising out of his nature and temperament, and which is to some extent, political." [Footnote 2, p. 707).

The court concluded that:

> "The record contained substantial indications that the objections were not because of 'religious training and belief' in the sense those words are used in the statute, and the weight of the evidence was a matter for the Appeal Board.
>
> "[12] For the foregoing reasons we find no error in the decision of the trial court and the judgment of conviction is accordingly affirmed." [708].

Nevertheless, in the *Philips* case the same court found there was a sufficiently different set of facts to reach an opposite conclusion, just as we contend here. The registrant Philips had introduced in evidence a play he had written and the decision largely turned on its interpretation.

The court stated:

> "In view of the weight given in these procedings to this play, we shall need to discuss it below. Unless it justifies a different result it seems clear that the

> draftee had shown himself a conscientious objector within the statutory meaning as defined in the Kauten case and was entitled to exemption as such, so long at least as the principles there announced stand as the authoritative interpretation of the Act. It is to be noted that the facts differ from those upon which we relied in the Kauten case as an alternative ground for affirmance of the conviction there. For here the opposition to war was a deep-seated one applying to war in general and was not based upon political objections to this particular war." [523]

C. The First Amendment Is Offended.

In this particular argument we are not discussing whether, in the draft law Congress was required to exempt conscientious objectors from the operation of the law, or whether the requirement of "religious" belief is constitutional. We are discussing here the fact that Congress did exempt conscientious objectors who, by reason of religious training and belief, are conscientiously opposed to war in any form and then went on, contrary to the prohibition of the First Amendment, to (a) include as religious only those believing in a Supreme Being and (b) to exclude from the meaning of "religion" a particular type of belief, namely, a religious belief based on political, sociological, philosophical, or moral tenets as distinguished from a belief in a Supreme Being. By so circumscribing what religion shall mean Congress did the very thing which the prohibition of the First Amendment sought to prevent. It made "a law *respecting an establishment* of religion." And if Congress didn't intend this the fact remains that it has been so construed [and/or misused] by the Department

of Justice and the Selective Service System. Had Congress merely stated that conscientious objectors, who by reason of religious training and belief were conscientiously opposed to war in any form, were to be exempt, a totally different problem would be involved. But Congress did not do this; it set forth its own meaning as to what religion is. This it had no power to do.

This principle of constitutional law is clearly set forth by the Supreme Court in *United States* v. *Ballard,* 322 U.S. 78, 86:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. * * * Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. Board of Education v. Barnett, 319 U.S. 624. It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs * * * The fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence and disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state * * * The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."

The establishment clause does not merely prohibit an "establishment"; it forbids any "law *respecting* an estab-

lishment" (emphasis added). Thus, even if we assume that "establishment" has the limited meaning the critics of the recent "prayer" case (*Engel* v. *Vitale,* 370 U.S. 421) give it, the prohibition in the establishment clause still appears to be substantially broader in scope than those critics imply.

Then, too, it is at least very doubtful that "establishment" meant to the founding fathers what these latter-day semanticists claim. In his "Memorial and Remonstrance against Religious Assessments", the man who is credited with having the largest part in the writing of the establishment clause, James Madison, repeatedly used the word "establishment" to describe what was essentially only a tax bill imposing a relatively small assessment on each citizen of Virginia to raise money to support "teachers" of the religion of his choice.

William J. Butler, in an article entitled The Regents' Prayer Case: In the Establishment Clause "No Means No" in the May, 1963 issue of American Bar Association Journal says:

> "The author of the establishment clause interpreted its language very broadly. In the same session of Congress in which the Bill of Rights was passed, Madison opposed the inclusion in the first census bill of a provision for the listing of occupations on the ground that such provision would require the enumeration of clergymen and would, therefore, violate the prohibition that 'Congress shall make no law respecting an establishment of religion'! "

The Congress, in our draft law, did the very thing that was forbidden to it. Indeed, Congress seems to recognize

that political, sociological, or philosophical views or a personal moral code may be a religion but it specifically prohibited that kind of religion from protection. This it cannot do.

As was said in *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *"

The Congress, therefore, by attempting to set up an orthodoxy in religion has exceeded the salutary restraining bounds of the First Amendment for to allow Congress to define or limit religion in any particular act or measure is an opening wedge to permit Congress to define in greater detail and on subsequent occasions the nature of religion and its practice.

D. The VIth Article, 3rd Clause Is Offended.

We assert that the Supreme Being clause of the draft law offends the VIth Article (3rd Clause) of the Constitution.

> "* * *; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

This point was also raised recently in *Torcaso* v. *Watkins,* 81 S. Ct. 1680 (1961), but was not passed on "because we are reversing the judgment on other grounds * * *" (n. 1, p. 1680). Torcaso had been refused a notary commission because he refused to declare his belief in the existence of God.

It is a matter of common knowledge to all who have dealt with conscientious objectors that they prefer prison to surrendering their scruples, thereby becoming felons and ineligible for public office.

Estep v. *United States,* 327 U.S. 114, and many dozen of the Court's cases.

In California and in most, if not all the states, a man convicted of a felony cannot hold public office.

California Penal Code, § 2600.

A test, based on religion, that a portion of the population cannot meet, is a test proscribed by the VIth Amendment. Here, the test in effect condemns such a person to a felon's disabilities.

The Supreme Being clause accomplishes indirectly what is prohibited to be done directly.

Its eventual effect is to effectively prevent all conscientious objector males who do not believe in a Supreme Being from qualifying for public office.

In *U. S.* v. *American Brewing Co.,* 296 Fed. 772, 776, the opinion reads:

> "Surely no one would so construe Article VI that the prohibition of a religious test applied only to officers named by the President, or the head of a department * * *"

E. The First Amendment Protects the Free Exercise of Individual Religious Belief.

Not only "an establishment of religion", but also "the free exercise" of religion, is the plain meaning of the pro-

hibition of the First Amendment. For, if the second clause could be thought to mean only "the free exercise of an establishment of religion," that would be a tautology, a superfluity, not adding anything but being sufficiently included in the first clause "respecting an establishment of religion." By the usual rule of construction, that specific terms prevail over general ones, if the second clause is not distinct and independent of the preceding clause, it could be a limitation thereof and restrict its application. But rather, the rule of *ejusdem generis,* as here applicable, does not have a narrowing affect, but the constitutional provision is enlarged to protect the individual as well as the collective right of religious freedom. Therefore this appellant as a religious conscientious objector should have the protective right about him of the First Amendment.

As to principles of construction see:

U. S. v. *Gallililand,* 312 U.S. 89, 61 S. Ct. 518, 85 L. Ed. 598.

Badger v. *Hoidale,* 88 F.2d 208, 109 A.L.R. 798.

Such a construction of the constitutional amendment appeals to the religious sense, for then it protects the most cherished and sacred of religious convictions, that of belief regardless of church, institution, or establishment. There is almost no religion, sect or denomination, which does not regard as more sacred one's inner beliefs than his outward conformity to a particular cult, group, or incorporation of institutional worship. The function of the religious institution is largely for the support, protection and encouragement of the individual or personal faith. For example, the most august of religious institutions by virtue

of age and number of communicants in the Western world, the Roman Catholic Church, does not disparage but glorifies such individual faith within its own.

What then of the churchless man whose religious convictions may be as intense and sincere as any of a numerous body of believers? Does the Constitution deny him the protection of religious freedom? Not as we construe the First Amendment. His right is as jealously safeguarded as any. Here the rights of all are the rights of every one.

The importance of this issue is even more impressive when we reflect that 64 million Americans are reported to have no membership in any church or religious institution. Many, probably most of them in our experience, have a religion of some sort, and a considerable number of them do not believe in a Supreme Being. It is said especially of the more educated ones, a large percentage have none of the usual religious beliefs, such as of deity and immortality, but who nevertheless are conscious of profound religious feeling. A larger number still of these have religio-metaphysical beliefs which do not accord with orthodox conceptions such as are incorporated in this Act.

Perhaps the following excerpt from Arthur E. Briggs' "Walt Whitman: Thinker and Artist" may give a clearer conception of a religious humanism which is neither theistic nor atheistic but is highly individuated:

> "To those who assume that religion is inextricably joined with notions of God and immortality, which had a special unorthodox significance for Whitman,

> it may be important that they were a self-conscious expression of his religion. But it should also be remarked with Elton Trueblood that 'religion is not so much finding God, as reaction to the reality which has found us? More correctly it may be said, that religion is the reality which we have discovered in and through ourselves, which is the substance of the faith and the sustaining beliefs we have. Religion is the human faith by which we live and work, and it is stronger as it exists without external objects or gods or God or immortality or life beyond this one as the contents of its beliefs."

Whitman did not believe in churches, but he believed in men, and that is doubtless the belief of far more religious persons than is commonly supposed.

Interpretation of the First Amendment as protection to the free exercise of the religion of each and every man should be of special value at this time when the United States is so deeply involved in promoting harmonious relations with all peoples. For it must be remembered, as shown elsewhere in this brief and as pointed out in the enlightened opinion of Justice Peters in *Fellowship of Humanity* v. *Alameda County,* 153 Cal. App. 2d 673, 315 P.2d 394, that the more populous religions of the world do not profess belief in a Supreme Being. It therefore behooves the United States of America to stand for religious freedom as a basic principle of our Constitution.

In *Torcasso* v. *Watkins,* 367 U.S. 488, 81 S. Ct. 1680, as we forecast the implicit meaning of that great decision, neither State nor Federal Government can constitutionally establish a religious test for any immunity or privilege

of a citizen of the United States. But such being the effect of the provision of the Draft Act which gives a special privilege and immunity to conscientious objectors who believe in a Supreme Being, in that respect that provision is unconstitutional by reason of attempting to impose a religious test upon such privilege or immunity in contravention of the First Amendment.

F. The Supreme Being Clause Imposes an Arbitrary and Unconstitutional Test for Religious Belief.

Finally, we argue that one may have religious belief even though he does not believe in a Supreme Being, and bases his belief on "philosophical" or moral tenets.

The history of religions and the writings of scholars in the field quickly permit us to list religions claiming over half the people of the world as denying a Supreme Being or grounding belief on philosophical-moral tenets.

Thus the eminent scholar, Max Muller, has said:

> "* * * if an historical study of religion had taught us * * * one lesson only, that those who do not believe in our God are not therefore to be called Atheists, it would have done some real good, and extinguished the fires of many auto de fé." Natural Religion, p. 228.

Most of the admittedly great religions of the world claiming many millions of followers actually *deny* the existence of a Supreme Being. Thus in Hastings, Encyclopaedia of Religion and Ethics 183, Buddhism is said to be "radically adverse to the idea of a Supreme Being—of a God, in the Western sense of the word." And the same work at page 185, quotes extensively from Hindu literature

to demonstrate that the Sankhya School of that religion positively denies this existence of God. Confucianism substitutes the concept of "Heaven" or "Sky" for God and makes its tenet "li" or the doctrine of philosophical-moral order. Lin Yutang in his Wisdom of China and India points out "Among the Chinese scholars, Confucianism is known as the religion of moral order." (p. 811). Typical Confucian sayings are: "Heaven sees as my people see, Heaven hears as my people hear," (to which Prof. E. E. Burtt, a Quaker *and* Buddhist, says "The general philosophical implication is that the mind of the common man is the ultimate court," p. 181 of Man Seeks The Divine, Harper, 1958), and "They who accord with Heaven are preserved; they who rebel against Heaven perish" (Lin Yutang, p. 767). Taoism, the other great Chinese religion, has no concept of deity; it is "a philosophical religion, centered in the deep wisdom of Lao Tse and Chuang Tse." The central concept is "tao" or "The way"; myriad things arise out of the "tao"; they separate themselves by aggression; only as they "return to the Tao" does man "gain light, love, peace, and immortality"; such is the central teaching of this profound little book (E. S. Burtt, pp. 185, 194). Even Hinduism, though it has "duties" lacks A Divine Being (again as Prof. Burtt indicates, p. 209): "First and foremost is the concept of Brhman, the metaphysical absolute. Out of Brhman come all things; to Brhman all things return. In himself Brhman is unknown and unknowable." So the record could be extended almost indefinitely.

It is easy to refer to appellant Mac Murray as an agnostic or as an atheist. History is replete with the

stories of non-conformists who were called atheists because they did not believe according to the current mode. Outstanding, of course, are the early Christians who, pious and moral though they were, were called atheists because they did not believe as did the Greeks or Jews. (Parenthetically we may note that they too were often punished by the Romans for refusing military service.)

> "Comte's religious conception appears to be atheistic, insofar as it rejects the view that nature and humanity are the products of a self-existent and self-conscious Eternal Cause." (2 Hastings, Encyclopaedia, 179).

Auguste Comte, it will be recalled, is considered to be the founder of modern sociology. Yet Hastings naturally assumes Comte's view to be a "religious conception". Speaking of Comte's followers, the Positivists, Dr. Stanley Coit, founder of the English "Ethical Culture" societies thus treats of their ideal of God:

> "So far as I am aware, the Positivists have never declared that Humanity is God. But they have maintained that all the homage and obedience which had been rendered to God should now be transferred to Humanity. They have worshipped Humanity, they have prayed to it, they have found strength and consolation in communion with it. Surely, then, it has become their God." (International Journal of Ethics, July, 1900, p. 425).

The lack of a positive assertion as to the existence of God is prominent in the religious teachings of the Unitarians and Universalists today. And prominent members of our society from whom we have derived considerable of

our heritage have been among those of similar inclination.

Thus, Jefferson, in writing to his nephew at school, said:

> "Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of God; because, if there be one, he must more approve the homage of reason than of blindfolded fear * * * Do not be frightened from this inquiry from any fear of its consequences. If it end in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise and in the love of others which it will procure for you."
>
> J. E. Remsbury, Six Historic Americans, p. 66)

And on another occasion he said:

> "Why have Christians been distinguished above all people who have ever lived, for persecutions? Is it because it is the genius of their religion? No, its genius is the reverse. It is refusing toleration to those of a different opinion. * * *" (A. J. Nock, Jefferson, p. 304).

Congress has placed the stamp of orthodoxy in a field where none exists. The Constitution embodied a toleration for all religions and not for some. Many scholars have defined religion in terms other than a belief in the existence of God, for example:

1. Hoffding: Religion is belief in the conservation of value.
2. Marshall: The restraint of individualistic impulses to universal human impulses.

3. Kropotkin: A passionate desire for working out a better form of society.
4. E. S. Ames: The consciousness of higher social values.
5. Elwood: Participation in ideal values of the social life.
6. E. A. Ross: The conviction of an idea bond between the members of society.
7. Matthew Arnold: Religion is morality touched with emotion.
8. G. B. Foster: The conviction that the cosmos is idea-achieving.
9. G. W. Knox: Man's highest response to what he considers highest.
10. G. A. Coe: Living the good life.
11. J. R. Seely: Any habitual and permanent admiration.
12. Bonsanquet: Loyalty and devotion toward values which are beyond the immediate self.

Indeed, many of the founding fathers would have failed to qualify as "religious" if the present act were applied in relation to them.

The Albany Daily Advertiser in 1831, published a sermon by Reverend Dr. Wilson in which the assertion was made that most of the founders of our country were "infidels" and that of the first seven presidents not one of them had professed his belief in Christianity. (Barnes, History and Social Intelligence, p. 347.)

Dr. Barnes remarked:

> "The late Mr. (Theodore) Roosevelt, in one of his more facetious and gracious moments, referred to Thomas Paine, who had rendered most notable services in promoting the independence and formation of our country as a 'dirty little atheist.' By the same criteria most of the Fathers certainly Franklin, Washington, Adams, Jefferson, Madison, Marshall, Morris and Monroe, were likewise 'dirty little atheists' as they all shared the religious belief of Paine and most other intellectuals of the time, namely, either Unitarianism or Deism." (Ibid.)

Having a lively appreciation of the evils of bigotry in religion, the authors of the Constitution took care to prevent any popular effort to secure religious conformity by law. In 1796, an attempt to insert a "Christian" amendment in the Constitution was defeated. A speaker for the amendment referred to Washington's "Atheistic proclivities", censuring his admiration for the works of Thomas Paine. Washington, as we know, during his second administration, assured the Moslems of Tripoli, through his diplomatic representative, that "The government of the United States is not in any sense founded on the Christian religion"—a view later approved by John Adams, who sent the treaty containing this statement to the Senate, and by Jefferson, under whose administration the treaty containing the very quoted words, was ratified (Messages and Papers of the Presidents, pp. 200, 245, 390).

During the campaign for the presidency in 1800, Jefferson was widely attacked as a free-thinker. He was accused of disbelief in the conventional religion of his time,

and so fearful were the orthodox of his infidel opinions that two pious ladies of New England, when they heard he was elected, buried their Bibles in the garden lest the terrible Jefferson send officers to confiscate the Holy Scriptures.

It can hardly be urged that any "popular" meaning of religion was intended by the authors of the Constitution to be used in determining whether a man is religious or not. Rather, if there be a criterion at all of the quality of being "religious", it must be sought in some other quarter than prevailing customs and inherited belief.

It has been shown, that from the earliest days of the Republic, numerous individuals, many of them illustrious figures in American history, obtained their moral and religious ideas from private study and reflection, and the quality of their religion became manifest in their lives. Countless men of today similarly derive their religious inspiration from unorthodox faiths; indeed, it is often claimed as one of the glories of American achievement that in the United States such men are free to practice their own individual religion. Shall we now circumscribe this freedom with limiting definitions founded on the dogmas of prevailing orthodoxy? Shall we jettison the right of an individual citizen to define his own religion and to practice it, when it is not the character of the practice which is in dispute—the law provides for religiously inspired conscientious objection—but simply the doctrinal authenticity of his profession of religion?

It is not here maintained that the question of whether a man is religious or not can be simply determined. For-

tunately, this problem is seldom presented to the Courts. But when such questions do arise, it is absolutely necessary, we submit, that the greatest of care be taken to protect that most crucial of the Four Freedoms—freedom of religion. A man's religion is his life. It is valued above life by the truly religious man. And the quality of a man's religion is best determined by reference to the quality of his actions and the consistency of his resolves.

Accordingly, the Act by defining out certain admittedly good, moral and ethical beliefs as not "religions" though, it has been shown, they have every earmark which goes to make religion and are world recognized as religions, violates appellant's right to protection under the First Amendment.

The Supreme Being clause in the current draft law places Congress' imprimatur on what religion is.

At least five religious groups are discriminated against by such a standard:

1. The Buddhists in the United States who include 60% of the 185,000 persons of Japanese ancestry, and a considerable portion of the Chinese-Americans. According to Hastings' Encyclopaedia of Religion and Ethics, at p. 183, Buddhism is "radically adverse to the idea of a Supreme Being, of a God, in the Western sense of the word." The Chinese who are Confucian or Taoist are also excluded.

2. Most of the Hindus are affected. The Information Please Almanac for 1954, p. 485, states there are approximately 10,000 Hindus in North America. In Hastings, supra, at p. 184, Hindu literature is quoted to show an important school of that faith denied the existence of God.

3. The Unitarian-Universalists number 151,557. The World Almanac, 1963, p. 706.
4. One group of the Quakers are not members of the National Council of Churches because they do not believe in the Trinity of Divinity.

And before denying a registrant one of the conscientious objector classifications on the assumption that he recognizes no duties "superior to those arising from any human relation" it would have to be established that man is merely human. That has not been established. Congress can create laws but can't create men, man has already been created both human and divine.

Finally, the courts have already stricken down laws of administrative action which attempted to require belief in a Divine Being as a test for religious exemption (*Washington Ethical Society* v. *District of Columbia*, 249 F.2d 127).

As a conclusion to this portion of our argument:

The Supreme Being addition to our 1948 draft law reminds one of the problems the British faced some years ago. Some attention to it may be helpful.

In The Law As Literature, Louis Blum-Cooper, 1961, The Rodley Head, London, the author reports the decision of Lord Sumner, J. A. Hamilton (1859-1934), in *Bowman* v. *Secular Society*. The author relates that it was a case concerning

> "the validity of a bequest to a society whose main object was to propagate anti-Christian doctrines. Sumner, delving deep into the history of the criminal offense of blasphemy, gave the quietus to the supposed

doctrine that Christianity was a part of the law of England. Blasphemy, he said, was, in the absence of scurrility or indecency calculated to shake the fabric of society, not a criminal offense." [295].

As quoted by the author the Judge said:

> "When Lilburne was on his trial in 1649, he complained that he was not allowed counsel and appealed to the judges 'to do as they would be done by.' 'You say well', replied Lord Keble. 'The law of God is the law of England.' But all the same, Lilburne had to do the best he could for himself. A passage from Lord Coke may also be quoted. Brooke, J., had once observed casually (Y.B. 12 Hen. 8, fo. 4) that a pagan could not have or maintain any action, and Lord Coke in Calvin's Case, founding himself on this and on St. Paul's Second Epistle to the Corinthians (Ch. 6, V. 15), stated that infidels are perpetui inimici, and 'a perpetual enemy cannot maintain any action or get anything within the realm'. Of this Willes, C.J., in Omichund v. Barker observes: 'Even the devils themselves, whose subjects he (Lord Coke) says the heathens are, cannot have worse principles; and beside the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which this nation reaps such great benefits.' Evidently in this interval the spirit of the law had passed from the Middle Ages to modern times. So far it seems to me that the law of the Church, the Holy Scriptures, and the law of God are merely prayed in aid of the general system or to give respectability to propositions for which no authority in point could be found." [299].

Near the conclusion of his opinion Lord Sumner said:

> "My Lords, with all respect for the great names of the lawyers who have used it, the phrase 'Christianity is part of the law of England' is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: 'no man can be expected to be faithful to the authority of man, who revolts against the Government of God.' One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? Best, C.J., once said in Bird v. Holbrook (a case of injury by setting a spring-gun): 'There is no act which Christianity forbids, that the law will not reach; if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England'; but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. 'Thou shalt not steal' is part of our law. 'Thou shalt not commit adultery' is part of our law, but another part, 'Thou shalt love thy neighbor as thyself' is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England." [306-307].

By the above argument we do not say, for we need not, that this is not a "Christian Nation." It is to say that Christianity is not a part of the law of the United States just as it is not part of the law of England. On this point also recall our argument made hereinabove wherein we quoted George Washington, writing to the Tripoli government as President of the United States, that "The government of the United States is not in any sense founded on the Christian religion."

There are wide differences among conscientious objectors. Some base their beliefs and conduct upon their duty towards God; others upon their duty towards Man. In each class individual views vary as widely as individual powers of coherent statement. Underlying the differences, however, is a unity which permits the treatment of the point of view of the conscientious objector as a single one. Norman M. Thomas clearly stated it at the beginning of WWI in an article entitled "War's Heretics," which appeared in the August 11, 1917, issue of the Survey:

> "In short, conscientious objectors include Christians, Jews, agnostics and atheists; economic conservatists and radicals; philosophic anarchists and orthodox socialists.
>
> "It is not fair, therefore, to think of the conscientious objector simply as a man who with a somewhat dramatic gesture would save his own soul though liberty perish and his country be laid in ruins. I speak with personal knowledge when I say that such an attitude is rare. Rightly or wrongly, the conscientious objector believes that his religion or his social theory in the end can save what is precious in the world far better without than with this stupendously destructive war."

Millions of Americans would find it impossible to believe, even if this Court should so hold, that our fundamental law secures no place in democracy for persons of such conviction. It lies deep in the moral foundations of every one who has been an American schoolboy that the cardinal excellence of our government is that it assures,

to all men at all times, freedom—which, to mean anything, must mean freedom to believe as individual judgment and conscience may direct, and, within certain limits of public morals, to govern conduct accordingly. The Constitution expresses the guaranty of such freedom both indirectly, by recognizing the retention by the people of their unenumerated natural rights (Amendment IX), and directly, as we have already argued by forbidding Congress to make laws prohibiting the free exercise of religion (Amendment I).

The Act, by constraining violation of conscience, prohibits the free exercise of religion to all conscientious objectors, whether their objection rests upon their duty towards God or their duty towards Man.

The twentieth century, however, must and does recognize that religion can surpass and omit all notion of relations with a Maker. For much religion nowadays has done more than escape from churches. It has escaped also from theology. It is still possible for some to state that Jesus hates a pacifist. But many men take responsibility for their beliefs themselves instead of putting it upon a deity.

The thought has been recently expressed by the New York Times editorially:

> "A few weeks ago Augustin Cardinal Bea, one of the Pope's closest advisers, told an American audience that man's right to choose his own religion or even to choose to have no religion is an accepted teaching of the Church. The 81-year-old prelate added that 'both individuals and society should leave each one free to

accept and to fulfill his obligations and duties exclusively by the use of his own free will.' "

"In similar vein the Rev. Hans Kung, dean of the theological faculty at the University of Tubingen in West Germany, has said that ecclesiastical obedience never requires anything to be done contrary to conscience. 'True ecclesiastical obedience', Father Kung asserted, 'unites subject and superior in a common responsibility, serving the true liberty of a Christian man.' "

"If Cardinal Bea and Father Kung are representative of the thinking of the present-day leaders of the Church, as there is every reason to believe, the fresh air is already blowing with gale force in one of the most venerable and most venerated institutions of all mankind." [April 28, 1963].

Interestingly, this appears to have been the view of a high military official who almost 50 years ago, had the opportunity to temper the severity of the then current draft law. The Selective Service Act of 1917 exempted only from combat service those men who were recognized members of the historic peace churches. By order of the Adjutant General, December 19, 1917, exemption was extended to men whose convictions against war were not based on religious affiliation. This order stated in part:

"The Secretary of War directs that until further instructions on the subject are issued 'personal scruples against war' should be considered as constituting 'conscientious objection' and such person should be treated in the same manner as other 'conscientious objectors' under the instructions contained in confidential letter from this office dated October 10, 1917."

The foregoing order did not apply to all conscientious objectors, i. e. those opposed to any and all military service, but it gave cognizance to the great American tradition of freedom of conscience in recognition of "personal scruples against war".

Do beliefs so self-shouldered lose sanctity? Must the conduct which flows from them do without the constitutional protection which would unquestionably attach were they arbitrarily associated with divine revelation?

> " 'He believes in No-God, and he worships him,' said a colleague of mine of a student who was manifesting a fine atheistic ardor; and the most fervent opponents of Christian doctrine have often enough shown a temper which, psychologically considered, is indistinguishable from religious zeal."
> William James, The Varieties of Religious Experience, page 35.

It is the psychological fact, not its theological suit of clothes, which the First Amendment to the Constitution protects.

As we have already commented the framers knew something of fanaticism, intolerance and persecution. They realized that under stress of conviction as to matters of pre-eminent import, even the wisest, most sincere and most humane sometimes lose sight of their own human fallibility and see no wrong in forcing others to walk in paths of which they themselves feel sure. And they intended that under a government founded upon the proposition that men are entitled to life, liberty, and happiness if they can find it, no man's soul should be shamed or

aroused as, for example, a Roman Catholic's would be by statutory compulsion to defile the image of the Virgin. They were dealing for time to come with matter of substance, not with externalities. At a time when Protestant Christianity was practically universal, contemporary utterances as to freedom of conscience were naturally as a rule colored by allusions to the church and the Deity. But these utterances clearly intimate that the substance of freedom of conscience was perceived and intended. Jefferson, for example, in his address to the Danbury Baptist Association (8 Jefferson's Works, 13; quoted in *Reynolds* v. *U. S.*, 98 U.S. 145 at 164), said this:

> "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith and worship; that the legislative powers of the government reach actions only, not opinions—I contemplate with sovereign reverence that act of the whole American people which declared that their Congress should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced that he has no natural right in opposition to his social duties."

Chief Justice Waite's interpretation of this utterance is as follows:

> "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted

> almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive good order."

Another statement of Jefferson's (1 Works, 45; also quoted in *Reynolds* v. *U.S.*, at page 163) is still more clear-cut and illuminating. This was in the preamble to the Virginia bill "For establishing religious freedom," which he drew in 1785:

> "To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty."

The view that the framers of the Constitution meant to protect the right to think and believe, regardless of association with church or Deity, is thus supported by contemporary evidence as well as by sensible inference. And since a man's religion is thus in effect synonymous with the beliefs he holds sacred, an exercise of religion occurs whenever he does or refrains from doing anything whatever by reason of belief and under penalty of spiritual self-disgrace.

The religious character of faith or conduct is not affected by its reasonableness or probable or possible rightness. Faith springing from instinct, tradition, or superstition may be as sacred as that which springs from the reasoning processes of well-informed intelligence. For, since everything human is fallible, there is no authorita-

tive criterion of the rightness of anything. The blindest arbitrary assumption has at least the chance of being as right as reason. For reason itself in the last analysis only guesses. It guesses not only at conclusions of conduct, but also at the diagnosis of determining conditions and the appraisal of the relative weight of facts—as for example those bearing upon the precise nature and proximity and relative seriousness of foreign and domestic menaces of oppression or military autocracy.

The genuine intensity of belief is the one criterion of its religious character and that of the conduct it induces.

Conscientious refusal to take part in war is equally an exercise of religion. He who believes in democracy and more democracy as the means of carving out for populations as well as for favored individuals the possibility of good lives, and at the same time feels that the progress of the democracy in which he believes will be thwarted instead of served by war, may believe that he cannot put on a uniform and go out to kill and die without a shame at least as deep as that of his fellow citizen who thinks otherwise and participates in war. And the shame of both is the same kind of shame as that of the Protestant renegade who denied his faith at the doors of the Inquisition.

It is recognized that the right to conform conduct to conscience is subject to the limitation declared in the Mormon cases—that the conduct must not be such as to outrage the moral sense of the community. Works of death in general shock that moral sense.

Can it be that this Act of Congress has not only changed, but completely reversed morality?

CONCLUSION.

There are two opposing views on constitutional supremacy:

Many agree with Elihu Root's 1917 speech, reprinted in the West Publishing Company's Docket for November, 1917:

> "What is the effect of our entering upon this war? The effect is that we have surrendered, and are obliged to surrender, a great measure of that liberty which you and I have been asserting in court during all our lives—power over property, power over person. This has to be vested in the military commander in order to carry on war successfully. You cannot have free democracy and successful war at the same moment. The inevitable conclusion is that, if you have to live in the presence of a great, powerful military autocracy as your neighbor, you cannot maintain your democracy."

We urge the court to give the answer to Elihu Root's philosophy which the Supreme Court gave to such reasoning in Civil War times:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of the government. Such a doctrine leads directly to anarchy or despotism."
> Ex parte Milligan, 4 Wall 2.

The time has not come yet for America to declare that freedom is a failure.

Dated: October 4, 1963.

Respectfully,

J. B. Tietz.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. Tietz,
Attorney.